

United States Senate

January 4, 2021

Hon. Steven Mnuchin
Secretary, United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, D.C. 20220

(sent electronically)

Re: Notice of Proposed Rulemaking—Requirements for Certain Transactions Involving
Convertible Virtual Currency or Digital Assets

Dear Secretary Mnuchin,

Thank you for the opportunity to comment on the Treasury Department's Notice of Proposed Rulemaking (NPRM) regarding Bank Secrecy Act (BSA) requirements for certain transactions relating to "self-hosted" or "unhosted" digital asset wallets.

I am deeply concerned that adoption of a rule at this juncture would be hasty. It has been widely discussed in other comments and media coverage that the Treasury Department is pursuing an unconventional process under the Administrative Procedure Act¹ which may be subject to legal challenge. I echo those concerns.

When we spoke a few weeks ago, I emphasized that a fifteen-day comment period over the holidays is simply not appropriate for regulating an emerging industry with a value of hundreds of billions of dollars. Moreover, the technical, legal and business issues that surround digital assets are innately complex and are worthy of maximum industry engagement and a sixty-day comment period. A robust, transparent process makes good policy.

The United States is in a battle for competitiveness with China and Russia regarding digital assets and other forms of financial technology. Those countries, and others, are innovating in this field at a rapid pace.² Without broad consensus among American digital asset stakeholders, the NPRM is a step backward at the same moment our country is making progress and strengthening our national innovation efforts. This includes the strong legal framework for digital assets adopted by

¹ 5 U.S.C. § 553(a)(1).

² James Cooper, *That Decoupling Sound: China, the US and a Year of CBDCs*, COINDESK, Dec. 28, 2020, <https://www.coindesk.com/decoupling-sound-china-cbdc>; *Spending with China's Digital Yuan Around \$300 Million*, REUTERS, Nov. 2, 2020, <https://www.reuters.com/article/china-currency-digital-idUSL1N2HO0B1> ("China's digital yuan is one of the most advanced central bank digital currency (CBDC) initiatives underway around the world..."); Anna Baydakova, *Digital Ruble 'Promising,' Pilot Likely in 2021, Says Bank of Russia Chief*, COINDESK, Oct. 23, 2020, <https://www.coindesk.com/bank-of-russia-chief-talks-digital-ruble-sees-pilot-in-2021>.

my home state of Wyoming, which is cited by the NPRM.³ Hasty adoption of a rule will hamper these innovation efforts. I want Wyoming and the United States to be open to responsible innovation in financial technology. However, I fear this approach may have the opposite effect.

Substantively, the NPRM has a number of flaws that are reflective of rushed policymaking. Three are highlighted below:

- (1) The NPRM extends the BSA beyond Congress' intent and past practice. The NPRM states that “the reporting requirements of this proposed rule are a virtual currency analogue to the CTR [Currency Transaction Report] reporting requirement.”⁴ However, the NPRM is not actually a direct analogue to traditional CTRs. Currency transaction reports for traditional assets do not require counterparty information,⁵ but the NPRM would ostensibly require this information to be submitted to the Treasury Department, including the name and physical address of each counterparty.⁶

The federal financial regulators' *BSA/AML Examination Manual* establishes that “knowing your customer” is the base expectation for financial institutions.⁷ However, the proposed rule likely establishes “know your customer's customer” requirements, which is a step beyond current practice. This kind of extended requirement has “traditionally been resisted by financial regulators for good reason” because this requirement can be defeated by malicious actors and impose a disproportionate burden on regulated entities with limited return.⁸ As a result, the NPRM's counterparty requirement is a more onerous requirement than existing rules for other forms of value transfer.

I and other colleagues may consider introducing legislation under the Congressional Review Act⁹ on this basis.

- (2) The rule fails to extend a traditional bank exemption from CTR filings without sufficient analysis. 31 U.S.C. § 5313 provides a number of mandatory and discretionary exemptions from filing CTRs for banks. In the context of traditional assets, banks

³ *Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, 85 Fed. Reg. 83,840, 83,844 fn. 23 (Dec. 23, 2020).

⁴ *Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, 85 Fed. Reg. 83,840, 83,844 fn. 31 (Dec. 23, 2020).

⁵ See 31 C.F.R. § 1010.311; FinCEN, *FinCEN Educational Pamphlet on the Currency Transaction Reporting Requirement*, <https://www.fincen.gov/fincen-educational-pamphlet-currency-transaction-reporting-requirement> (last visited 1 January 2021).

⁶ *Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, 85 Fed. Reg. 83,840, 83,844–45 (Dec. 23, 2020).

⁷ See Federal Financial Institutions Examination Council, *BSA/AML Examination Manual*, <https://bsaaml.ffiec.gov/manual> (last visited 1 January 2021).

⁸ Jai Ramaswamy, *How I Learned to Stop Worrying and Love Unhosted Wallets*, Coin Center, Nov. 18, 2020, <https://www.coincenter.org/how-i-learned-to-stop-worrying-and-love-unhosted-wallets/>.

⁹ 5 U.S.C. § 801 *et seq.*

(“depository institutions”) are exempt from filing CTRs relating to certain business transactions and payroll account customers.¹⁰ The NPRM states “[n]either of these discretionary categories appear likely to be counterparties to transactions between banks’ hosted wallet customers and unhosted or otherwise covered wallets.”¹¹

The digital asset industry is still evolving, and it is much too early to make such a broad assertion. It is equally premature to say that such transactions will not become more prevalent in the near future. Depository institutions like Kraken Bank and Avanti Bank & Trust will be conducting digital asset custody services and other banking activities in the financial technology space beginning in the coming months. Many of the customers of these banks will be businesses,¹² including affiliates engaged in regulated capital markets activities with digital assets. The NPRM will directly burden these activities. Further analysis should have been undertaken by the Treasury Department with respect to emerging bank digital asset activities, including those in Wyoming.

- (3) The rule fails to adopt a more appropriate risk-based approach for digital asset transactions. To this point, the BSA has heavily focused on transaction data collection from largely law-abiding account holders, instead of focusing more appropriately on illicit activity. Moreover, significant data collection can be a target for intrusion.¹³

A more holistic, risk-based approach is likely appropriate for digital asset markets. Enhanced use of digital asset analytics, authorizing a more risk-based approach to counterparty identification/activities (instead of a prescriptive rule) and a greater understanding of money laundering/illicit activity typologies in digital asset markets is simply a more effective means of facilitating BSA compliance.

I urge you to reconsider adoption of the NPRM until adequate public comment can take place and the Treasury Department has greater opportunity to consider the complex issues at hand.

Wyoming has spent the last six months studying these important issues and has recently completed development of the first detailed BSA/AML examination manual for bank digital asset activities.¹⁴ I would encourage the Treasury Department to work closely with the Wyoming Division of Banking on this issue.

¹⁰ 31 U.S.C. § 5313(e); 31 C.F.R. § 1020.315(b)(6)–(7).

¹¹ *Requirements for Certain Transactions Involving Convertible Virtual Currency or Digital Assets*, 85 Fed. Reg. 83,840, 83,847 (Dec. 23, 2020).

¹² See, e.g., Wyo. Stat. § 13-12-103.

¹³ See, e.g., Amanda Macias, *White House Acknowledges Reports of Cyberattack on U.S. Treasury by Foreign Government*, CNBC, Dec. 13, 2020, <https://www.cnbc.com/2020/12/13/cyber-hack-on-us-treasury-by-foreign-government-.html>.

¹⁴ Jason Brett, *An Inside Look at Wyoming State Regulators Prepping For First Crypto Bank Examinations*, Forbes, Oct. 2, 2020, <https://www.forbes.com/sites/jasonbrett/2020/10/02/an-inside-look-at-wyoming-state-regulators-prepping-for-first-crypto-bank-examinations/?sh=4d39f80a9d9d>.

Rather than prematurely adopting a rule, the Treasury Department should immediately begin a transparent process to engage with Congress and industry, building a consensus to drive America forward.

Thank you again for the opportunity to provide comments. I look forward to working with the Treasury Department to promote America's continued leadership in the global financial system.

With best wishes,

A handwritten signature in cursive script, reading "Cynthia M. Lummis". The signature is written in dark ink and is positioned below the text "With best wishes,".

Senator Cynthia Lummis